Murrill Electric, LLC *and* International Brotherhood of Electrical Workers Local Union No. 611, AFL–CIO. Case 28–CA–21503

June 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 3, 2008, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

William Mabry III, Esq., for the General Counsel.
Wayne E. Bingham, Esq. (Bingham, Hurst & Apodaca), of Albuquerque, New Mexico, for the Respondent.
John L. Hollis, Esq. (John L. Hollis, P.A.), of Albuquerque, New Mexico, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Albuquerque, New Mexico on January 15, 2008. The charge in Case 28–CA–21503 was filed by International Brotherhood of Electrical Workers Local Union No. 611, AFL–CIO (the Union) on August 1, 2007. The Union filed an amended charge on October 25, 2007. Thereafter, on October 31, 2007, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Murrill Electric, LLC (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Mexico corporation with its office and principal place of business located in Carlsbad, New Mexico, where it is engaged in the building and construction industry as an industrial and commercial electrical contractor. In the course and conduct of its business operations the Respondent annually purchases and receives at its Carlsbad, New Mexico facility goods valued in excess of $50,000 directly from points outside the state of New Mexico. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether "On or about April 23, 2007, the Respondent refused to consider for hire Shawn Doyle" because of his union activity.

B. Facts

In late April or early May 2007, Shawn Doyle, a journeyman electrician and member of the Union, was sent to the Respondent's office by his business agent. Doyle, apparently at the behest of the business agent, recorded the conversation.[1]

Doyle, wearing an IBEW tee-shirt and an IBEW cap, entered the office around lunchtime, and told the clerk in the front office, Eric Reynolds, "I just wanted to come out and fill out an application." Reynolds, who had been hired about a week earlier, said "Okay." He then began looking in or around the desk of the office secretary, Mary, who happened to be at lunch, for the employment applications. As he was doing so, Doyle asked, "Your job will be [signed with the IBEW?]"[2] Craig

[1] In adopting the judge's decision, we find that he did not abuse his discretion in denying the General Counsel's motion to amend the complaint. See Sec. 102.17 of the Board's Rules and Regulations. We further note that the denial of the motion does not leave the Union without an opportunity to file a new charge within the limitation period of Sec. 10(b).

No party excepts to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider employee Shawn Doyle for hire because of his union activity and that it violated Sec. 8(a)(1) by disparaging the Union and by threatening employees that they would not be considered for hire because of their union affiliation.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[1] Doyle was not sure of the date; nor did he have a convincing recollection of the conversation.

[2] The transcript of the very brief conversation was received in evidence. The recording from which the transcript was taken was played on the General Counsel's computer in a large courtroom where the hearing was held. The rather poor recording coupled with the acoustics

Bunch, then acting as an estimator,[3] who was in an adjoining office on the other side of the wall from Reynolds, and overheard the conversation, answered "No" to Doyle's question. Reynolds, according to Doyle, "hollered back" to Bunch in the back office, "Where are they at, Craig?" meaning where are the employment applications, as Reynolds could not find them. Bunch, believing that Reynolds was asking where the Respondent's jobs were located, did not at that point say, "How's it going?" to Doyle as the transcript states. Rather, Bunch answered, ["The jobs?"] To which Doyle, realizing that Reynolds and Bunch were talking about two different things, interjected, "The application." Bunch, who had come to the front office area, directly repeated to Doyle what he had initially said from the other side of the wall, however, this time he said, "No, we're not Union," rather than simply, "No."

The General Counsel, in his brief, maintains that by this latter statement Bunch rejected Doyle's request for an application and refused to give Doyle an application.[4] I do not agree. Rather, I find that Bunch was again replying to Doyle's original question, namely, whether, "Your job will be signed with the IBEW?" and was not referring to Doyle's request for an application.

Clearly, Doyle understood this too, as is clear from the context of Doyle's very next remark, namely, "You're not going to go Union?"[5] To which Bunch again replied, "No." The conversation between Doyle and Bunch continued for some moments, in a seemingly friendly fashion, about the Union and unrelated matters, infra,[6] during which Bunch gave Doyle the name of a union shop. Doyle never asked whether Bunch was refusing to give him an application, and left without again asking for an application. Further, Doyle, during his testimony, was not asked whether he understood Bunch to be refusing to provide him with an application; nor did he so testify. In fact, as noted above, Doyle does not remember much of the conversation. Doyle did testify that after he and Bunch started talking, "the clerk that was looking for my application, he seemed to quit looking for my application." However, it has been established that Reynolds could not locate the applications, and it seems reasonable to conclude that Reynolds quit looking because he did not know where the applications were kept and/or because Doyle made it clear or at least strongly indicated during the course of the conversation that he was seeking a job with a union contractor, and in fact wanted the Respondent to sign up with the Union before he would be willing to work for the Respondent.

Thus, during the course of the conversation, Doyle repeatedly asks, apparently, about signing up with the Union. According to the transcript, Doyle says, "You might want to-," to which Bunch replies, "We don't want to have anything to do with the union."[7] At another point, Doyle states, "(inaudible) to sign up for the union?," to which Bunch replies, "No, it's a nasty word around here." The conversation then turned to another subject, namely Craig Bunch's brother, whom Doyle happened to know. Then Doyle ended the conversation, saying, "Well, I hate to bring—bring up a nasty word. Well, its good seeing you, Craig," and departed. Neither Doyle's testimony nor the transcript of the conversation indicates that Doyle was attempting to obtain employment so that he could organize the Respondent's employees, or even that he was wiling to accept a job with a nonunion shop.

The complaint alleges that these replies by Bunch, "threatened employees by informing them that they would not be considered for employment because of their Union affiliation." I do not agree. There is no evidence Doyle was told he would not be considered for hire because of his union affiliation.

The complaint also alleges Bunch "disparaged the Union by informing employees that the Union is a nasty word." In this regard, the General Counsel cites *Tradesman International Inc.*, 351 NLRB 399 (2007), wherein the Board finds unlawful an employer's statement to an open union organizer applicant for employment that if he intended to organize nonunion shops into union shops, then the employer was not interested in hiring him. This, according to the administrative law judge's analysis, "disparages the applicant's involvement with the union and it discourages or implies the futility of further pursuing his application." Unlike *Tradesman International*, however, the instant case has nothing to do with organizing. Here, Doyle mentions nothing about organizing the Respondent's employees, and seemingly wants Bunch, on behalf of the Respondent,[8] to sign up with the Union in an arrangement under Section 8(f) of the Act. To such a request, Bunch says no, that "union" is a nasty word; but he does not, as in *Tradesman International,* tell Doyle that the Respondent would not be interested in hiring him.

On the basis of the foregoing, I find the record evidence insufficient to establish that Doyle was refused an employment application, or that the Respondent threatened employees or

in the room made the conversation difficult to discern, and the recording was replayed many times. Upon repeatedly listening to the recording in a better setting, it is clear that the transcript is inaccurate in several respects. While the parties stipulated to the accuracy of the transcript, I shall not rely upon a transcript that is obviously incorrect. The corrections I am making to the transcript are set forth in brackets, and the parties may confirm or dispute the accuracy of these corrections upon listening to the recording once again.

[3] The status of Bunch is in issue and was extensively litigated. He is at various times an estimator, a leadman, a foreman of a crew, or a journeyman electrician working under a different foreman, depending on the Respondent's needs at the time. The Respondent denies that he is a supervisor or agent of the Respondent or has any authority or responsibility *vis-à-vis* applicants for employment. As I am dismissing the complaint on other grounds, his status need not be resolved.

[4] I credit Bunch's testimony and find that he had never handed out job applications. Further, I credit Bunch's testimony that he did hear Doyle ask for an application, but did not hand Doyle a job application because he didn't know where they were kept.

[5] Rather than, "You're not going to give me an application?"

[6] It turns out that Doyle recognized Bunch when Bunch entered the room.

[7] I am assuming Bunch's reply has some relation to Doyle's question. Therefore, I assume Doyle asked something about the Union.

[8] Doyle never asked Bunch's position with the Respondent and seems to assume that Bunch has the authority to speak for the Respondent and even enter into an agreement with the Union.

disparaged the Union in violation of the Act. Therefore, I shall dismiss the complaint in its entirety.[9]

[9] The General Counsel's motion to amend the complaint, denied at the hearing, is renewed in the General Counsel's brief. During the course of the hearing the General Counsel discovered that, according to the Respondent's employee handbook, employees' pay is a confidential matter and employees are not permitted to discuss among themselves the pay they receive for their work. I denied the General Counsel's motion at the hearing principally because, as the proposed amendment has nothing to do with the Respondent's alleged refusal to furnish Doyle a job application, it is unrelated to the complaint allegations. I again deny the General Counsel's motion for the same reason, and, additionally, as a result of my initial ruling, because the Respondent has not been given an opportunity to investigate, litigate and/or resolve this matter. See *Pincus Elevator & Electric Co*., 308 NLRB 684 (1992); *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.